

Decision 06-06-033 June 15, 2006

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of PacifiCorp (U-901-E) and
MidAmerican Energy Holdings Company for
Exemption Under Section 853(b) from the
Approval Requirements of Section 854(a) of the
Public Utilities Code with Respect to the
Acquisition of PacifiCorp by MidAmerican.

Application 05-07-010
(Filed July 15, 2005)

**OPINION GRANTING INTERVENOR COMPENSATION TO THE YUOK
TRIBE FOR SUBSTANTIAL CONTRIBUTIONS TO DECISION 06-02-033**

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O P I N I O N

1. Summary

This decision awards \$39,952.51 to the Yurok Tribe for its substantial contributions to Decision (D.) 06-02-033.

2. Background

D.06-02-033 authorized MidAmerican Energy Holdings Company (MEHC) to acquire PacifiCorp pursuant to Pub. Util. Code § 854(a)¹, subject to the conditions in Appendix D of D.06-02-033. Appendix D was based, in large part, on a Settlement Agreement signed by PacifiCorp, MEHC, and 15 protestants, including the Yurok Tribe. The conditions included the so-called “California Commitments,” which consisted of the following:

- C-1** The transaction will not diminish PacifiCorp’s ability or willingness to perform its legal obligations associated with its Klamath River hydroelectric system or PacifiCorp’s ability to recover associated costs.
- C-2** In implementing Commitment 36, PacifiCorp will make cost-effective investments in California as reasonably required to serve load.²
- C-3** PacifiCorp will continue to offer cost-effective demand side management programs in California.
- C-4** PacifiCorp will take the following actions to extend electric service to unserved Indian communities located in PacifiCorp’s service territory. Within 30 days of receiving a request for service by the Tribe(s), PacifiCorp will initiate discussions with the Tribe(s) and other appropriate stakeholders regarding the extension of electric service. Within 1 year PacifiCorp will file an application or other pleading

¹ All statutory references are to the Public Utilities Code.

² Commitment 36 requires PacifiCorp to spend nearly \$160 million on transmission and distribution infrastructure, operations, and maintenance.

that: (A) seeks permission to extend electric service to specified areas, or (B) states its reasons for not extending electric service.

C-5 PacifiCorp will provide \$150,000 per year for three years to fund a study by an independent consultant to identify the presence, distribution, and possible causes of toxic algae, and their toxins, in the Klamath River basin. The study will be designed and overseen in cooperation with the appropriate federal and state agencies.

C-6 PacifiCorp will provide an opportunity for the Settlement Parties to discuss implementation of Commitment 44.³

C-7 PacifiCorp will file an annual report regarding the California Commitments. If any Commitment is not being met, the report will propose corrective measures.

D.06-02-033 closed this proceeding.

3. Requirements for Intervenor Compensation

Pursuant to §§ 1801-1812, intervenors may obtain compensation for the reasonable costs they incur to participate in a Commission proceeding if all of the following requirements are satisfied:

1. The intervenor must be a customer or a participant representing consumers, customers, or subscribers of a utility subject to the Commission's jurisdiction. (§ 1802(b).)
2. The intervenor must file and serve a sufficient notice of intent (NOI) to claim compensation within 30 days of the prehearing conference (PHC) or other appropriate times. (§ 1804(a).)
3. The intervenor must file and serve a request for a compensation award within 60 days of a final order or decision. (§ 1804(c).)
4. The intervenor must demonstrate significant financial hardship. (§ 1804(b)(1).)
5. The intervenor must have made a substantial contribution to the proceeding through the adoption, in whole or in part, of the

³ Commitment 44 requires PacifiCorp to invest approximately \$812 million to reduce emissions at its existing coal-fired generation plants.

intervenor's contention or recommendations by a Commission order or decision. (§ 1803(a).)

6. The claimed fees and costs must be reasonable and comparable to the market rates paid to experts and advocates having similar training and experience and offering similar services. (§ 1806.)

For discussion here, the procedural requirements in Items 1-4 above are combined, followed by separate discussion of Items 5 and 6.

4. Procedural Requirements

To receive compensation, § 1802(b) requires an intervenor to be a utility customer or a participant representing customers. Section 1802(b)(1) defines a "customer" as: A) a participant representing consumers, customers, or subscribers of a utility; B) a representative who has been authorized by a customer; or C) a representative of a group or organization authorized by its articles of incorporation or bylaws to represent residential or small business customers. On November 9, 2005, the assigned Administrative Law Judge (ALJ) ruled that the Yurok Tribe is a customer pursuant to § 1802(b)(1)(C).

Section 1804(a) requires an NOI to be filed within 30 days of the PHC. A PHC was held on September 9, 2005. The Yurok Tribe filed a timely NOI on October 11, 2005.⁴ Section 1804(c) requires a request for compensation to be filed within 60 days of the final decision. The Yurok Tribe filed its request on April 14, 2006, within 60 days of D.06-02-033 being issued. The request is unopposed.

Finally, § 1804(2)(g) requires a showing of significant financial hardship. On November 9, 2005, the ALJ ruled that the Yurok Tribe satisfied this condition.

⁴ Due to weekends and a holiday, the last day to file an NOI was Oct. 11, 2005.

Based on the foregoing, we affirm the ALJ's ruling and find that the Yurok Tribe has satisfied all of the procedural requirements necessary to claim compensation in this proceeding.

5. Substantial Contribution Requirement

To obtain intervenor compensation, a customer must make a substantial contribution to a Commission proceeding. A substantial contribution occurs if the assigned ALJ or Commission adopts one or more of the customer's factual or legal contentions, or specific policy or procedural recommendations.⁵ A substantial contribution may also occur if the customer's participation materially supplements, complements, or contributes to the presentation of another party.⁶ Should the Commission not adopt any of the customer's recommendations, compensation may still be awarded if, in the judgment of the Commission, the customer's participation substantially contributed to the decision or order.⁷ For example, if a customer provided a unique perspective that enriched the Commission's deliberations and the record, the Commission could find that the customer made a substantial contribution. The Commission has also held that active participation in settlements might justify compensation.⁸

With this guidance in mind, we turn to the substantial contributions claimed by the Yurok Tribe. The Tribe states that it raised two issues. First, the Tribe expressed concern about the lack of electric utility service for most of the Yurok Reservation. This ultimately led to the Commission's adoption of California Commitment C-4, which requires PacifiCorp to respond to tribal

⁵ § 1802(i).

⁶ §§ 1802(i) and 1802.5.

⁷ § 1802(i).

⁸ D.05-09-010, 2005 CA. PUC LEXIS 349, *4 - 5.

requests for electric service. Second, the Tribe argued that PacifiCorp's dams on the Klamath River create a habitat for algae that produce toxins that are harmful to humans and animals. This ultimately led to the Commission's adoption of California Commitment C-5, which requires PacifiCorp to provide \$450,000 for a study of the causes of the toxic algae.

We agree with the Yurok Tribe that it made substantial contributions to D.06-02-033, particularly with respect to the Commission's adoption of California Commitments C-4 and C-5.

The Yurok Tribe states that it took appropriate steps to avoid unnecessary duplication by coordinating efforts with other participants. Further, the Tribe chose for reasons of economy and efficiency to not participate in every telephone conference call, face-to-face meeting, and Commission hearing. At no time did more than one of the Tribe's attorneys participate in any meeting, conference, hearing, or other event.

We recognize the Yurok Tribe's participation overlapped somewhat with the participation of the Karuk Tribe, as both Tribes advocated the adoption of California Commitment C-5. We conclude that because the Klamath River flows through the ancestral lands of both the Yurok and Karuk Tribes and is essential to the culture and sustenance of each Tribe, it was appropriate for both Tribes to participate fully on matters related to the Klamath River.

6. Reasonable Compensation Requirement

The Yurok Tribe requests \$40,548.76 for the following costs it incurred for its substantial contributions to D.06-02-033:

<u>Professional Fees</u>	<u>Year</u>	<u>Hours</u>	<u>Rate</u>	<u>Total</u>
Curtis Berkey	2005-6	27.4	\$225.00	\$6,165.00
Scott Williams	2005-6	115.4	\$225.00	\$25,965.00
Scott Williams	2006	4.2	\$112.50	\$ 472.50

<u>Professional Fees</u>	<u>Year</u>	<u>Hours</u>	<u>Rate</u>	<u>Total</u>
Earl Nicholas Selby	2005-6	6.8	250.00	\$1,700.00
Merideth Drent	2005-6	11.9	205.00	\$2,439.50
Merideth Drent	2006	27.5	\$102.50	\$2,818.75
Alex Lowther	2005	6.5	\$80.00	\$ 520.00
<i>Subtotal - Hours & Fees</i>		<u>199.7</u>		<u>\$40,080.75</u>
<u>Expenses</u>				
Courier & Overnight Delivery				\$123.32
Westlaw				\$344.69
<i>Subtotal Expenses</i>				<u>\$468.01</u>
Total				<u>\$40,548.76</u>

Intervenors may be compensated for the reasonable costs they incur for their substantial contributions. The criteria we use to assess reasonableness are addressed below.

A. Claimed Hours

Customers must document the number of hours claimed and show that the claimed hours were related to, and necessary for, the substantial contribution. The Yurok Tribe claims 199.7 hours for five persons. Their work included the drafting of pleadings, attending negotiations, collaborating with other participants, and reviewing and drafting the settlement agreement.

The Yurok Tribe supported their claimed hours with a time sheet of daily hours and a brief description of how the daily hours related to this proceeding. We find that this documentation adequately supports the claimed hours.

B. Market Rate Standard

We next consider whether the claimed hourly rates are comparable to the market rates paid to advocates with similar training and experience.

The Yurok Tribe requests an hourly rate of \$225 for attorneys Berkey and Williams for work performed in 2005 and 2006.⁹ Berkey graduated from law school in 1979, and has represented Indian tribes for more than 25 years. Williams graduated from law school in 1974, and has been engaged in litigation practice since. In D.05-11-031, the Commission determined that it is reasonable to pay an hourly rate in 2005 in the range of \$270-\$490 to intervenor attorneys with 13+ years of experience since completion of law school.¹⁰ The hourly rate requested for Berkey and Williams falls below this range. Therefore, we authorize the requested \$225/hour rate for Berkey and Williams.

The Yurok Tribe requests an hourly rate of \$250 for attorney Selby for work performed in 2005 and 2006.¹¹ Selby graduated from law school in 1977, and has practiced public utility law for nearly 30 years. The Commission determined in D.05-11-031 that it is reasonable to pay an hourly rate in 2005 in the range of \$270-\$490 to intervenor attorneys with 13+ years of experience since completion of law school.¹² The hourly rate requested for Selby falls below this range. Therefore, we authorize the requested \$250/hour rate for Selby.

The Yurok Tribe requests an hourly rate of \$205 for work performed by Merideth Drent in 2005 and 2006. Drent graduated from law school in 2000, and has practiced Indian law since. In D.05-11-031, the Commission determined that it is reasonable to pay an hourly rate in 2005 in the range of \$250-270 to intervenor attorneys with 5-7 years of experience since completion of law

⁹ The Yurok Tribe represents that \$225 is \$25 less than Berkey's and Williams' standard rate of \$250.

¹⁰ D.05-11-031, *mimeo.*, pp. 16-17.

¹¹ The Yurok Tribe represents that \$250 is \$125 less than Selby's standard rate.

¹² D.05-11-031, *mimeo.*, pp. 16-17.

school.¹³ The hourly rate requested for Drent falls below this range. Therefore, we authorize the requested \$205/hour rate for Drent.

Finally, The Yurok Tribe requests an hourly rate of \$80 for legal research performed by Alex Lowther in 2005. Lowther is currently a second-year law student. The requested hourly rate is consistent with that authorized for law clerks and paralegals in prior Commission decisions.¹⁴ We conclude that the requested hourly rate is reasonable in light of this precedent. Therefore, we grant the requested hourly rate.

Consistent with Commission precedent, the Yurok Tribe requests one-half of the approved hourly rates for the time spent by their attorneys preparing the request for intervenor compensation. However, the Yurok Tribe requests the full hourly rates for the time spent by their attorneys preparing the NOI. Berkey spent 0.30 hours preparing the NOI and Williams spent 5.0 hours.¹⁵ In general, the Commission awards compensation for time spent by an attorney preparing an NOI at one-half the approved hourly rate, unless the NOI involved novel legal issues or complex legal analysis. There is no indication that the Yurok Tribe's NOI involved such matters. Therefore, we will award one-half of the approved hourly rates for the time spent by the Tribe's attorneys preparing the NOI.

¹³ D.05-11-031, *mimeo.*, pp. 16-17.

¹⁴ See, e.g., D.05-12-038, D.05-09-029, D.05-06-031, and D.05-02-005.

¹⁵ The time report submitted by the Yurok Tribe shows that Williams spent 2.90 hours on October 5, 2005, preparing the NOI, and 6.80 hours on October 7, 2005, working on numerous matters related to this proceeding, including preparation of the NOI. However, the time report does not allocate Williams' time on October 7 between the time spent on the NOI and other matters. Given that Williams worked on many matters that day, we estimate that he spent less than half his time that day, or 2.10 hours, working on the NOI.

C. Productivity

D.98-04-059 requires customers to demonstrate productivity by showing that the benefits of their participation exceeded the cost of their participation. The Yurok Tribe states that its participation led to the Commission's adoption of California Commitment C-4, which requires PacifiCorp to consider tribal requests for electric service. The Tribe believes this Commitment may provide significant benefits to future ratepayers on the Yurok Reservation, since most of homes on the Reservation are without electrical service, as are the public elementary school, community center, fire station, three community water stations, a church, and the Head Start facility.

The Yurok Tribe also states that their participation led to the Commission's adoption of California Commitment C-5, which requires PacifiCorp's shareholders to provide \$450,000 over a three-year period for an independent study of the causes of toxic algae in the Klamath River. The Tribe believes this Commitment will provide significant public health benefits.

We find that the benefits of the Yurok Tribe's participation are significant but difficult to quantify. The Tribe's participation helped secure \$450,000 of shareholder funding for a study of the causes of toxic algae in the Klamath River. Although the ultimate benefits of the study are uncertain, it is in the public interest to learn more about the harmful algae in order to control or eliminate the algae. The Tribe's participation also contributed to the Commission's adoption of California Commitment C-5, which requires PacifiCorp to take specified steps upon receiving a request to provide electric service to Indian reservations. The ultimate result may be the provision of needed electric service to one or more Indian reservations, which would be a major benefit. Even if PacifiCorp does not provide electric service, we believe it would be in the public interest to know

why it cannot be done. In light of the substantial public-interest benefits and relatively modest costs associated with the Yurok Tribe's participation, we find that the Tribe's participation was productive.

D. Direct Expenses

The Yurok Tribe requests \$468.01 for document delivery and Westlaw use. These direct expenses are commensurate with the work performed, and we find these costs to be reasonable.

7. Award

We award \$39,952.51 as set forth in the following Table:

<u>Professional Fees</u>	<u>Year</u>	<u>Hours</u>	<u>Rate</u>	<u>Total</u>
Curtis Berkey	2005- 6	27.1	\$225.00	\$6,097.50
Curtis Berkey*	2005	0.3	\$112.50	\$ 33.75
Scott Williams	2005- 6	110.4	\$225.00	\$24,840.00
Scott Williams*	2005- 6	9.2	\$112.50	\$1,035.00
Earl Nicholas Selby	2005- 6	6.8	\$250.00	\$1,700.00
Merideth Drent	2005- 6	11.9	205.00	\$2,439.50
Merideth Drent*	2006	27.5	\$102.50	\$2,818.75
Alex Lowther	2005	6.5	\$80.00	\$ 520.00
Subtotal - Hours & Fees		199.7		\$39,484.50
<u>Expenses</u>				
Courier & Overnight Delivery				\$123.32
Westlaw				\$344.69
Subtotal Expenses				\$468.01
Total				\$39,952.51

* Time spent preparing the NOI and/or compensation request.

PacifiCorp shall pay the award. Consistent with Commission precedent, interest shall be paid on the award (at the rate earned on prime, three-month commercial paper, as reported in Federal Reserve Statistical Release H.15) commencing on June 28, 2006, the 75th day after the Conservation Groups filed their compensation request on April 14, 2006, and continuing until full payment of the award is made.

We remind the Yurok Tribe, like all intervenors, that Commission staff may audit the Tribe's records related to this award, and that intervenors must make and retain adequate accounting and other documentation to support all claims for intervenor compensation.

8. Waiver of Comment Period

This is an intervenor compensation matter. Accordingly, as provided by Rule 77.7(f)(6) of our Rules of Practice and Procedure, we waive the otherwise applicable 30-day comment period for today's Decision.

9. Assignment of Proceeding

John A. Bohn is the Assigned Commissioner and Timothy Kenney is the assigned ALJ in this proceeding.

Findings of Fact

1. The Yurok Tribe has satisfied all the procedural requirements to claim compensation in this proceeding.
2. The Yurok Tribe substantially contributed to D.06-02-033, as set forth in the body of today's Decision.
3. The Yurok Tribe' requested hourly rates for their attorneys that are reasonable, as they are even less than the market rates for persons with similar training and experience, based on the guidelines established in D.05-11-031.

4. The Yurok Tribe seeks compensation for the time spent by their attorneys preparing the Groups' NOI at the attorneys' full hourly rates. There is no indication that the preparation of the NOI involved novel legal issues or complex legal analysis.

5. The direct expenses claimed by the Yurok Tribe are reasonable and commensurate with the work performed.

6. Reasonable compensation for the Yurok Tribe is \$39,952.51.

7. The appendix of today's decision shows the components of this amount.

Conclusions of Law

1. The Yurok Tribe has fulfilled the requirements of Pub. Util. Code §§ 1801-1812, which govern awards of intervenor compensation, and are entitled to receive intervenor compensation for the reasonable costs they incurred with respect to their substantial contributions to D.06-02-033.

2. Commission precedent requires that the compensable time spent by intervenor attorneys preparing an NOI be compensated at one-half the approved hourly rate(s) unless the preparation of the NOI involves novel legal issues or complex legal analysis.

3. The time spent by the Yurok Tribe's attorneys preparing the NOI should be compensated at one-half of the hourly rates authorized herein.

4. The Yurok Tribe should be awarded \$39,952.51 in compensation for its substantial contributions to D.06-02-033.

5. The comment period for today's decision should be waived pursuant to Rule 77.7(f)(6).

6. The following order should be effective immediately so that the Yurok Tribe may receive the amount awarded therein as soon as possible.

O R D E R

IT IS ORDERED that:

1. The Yurok Tribe is awarded \$39,952.51 for its substantial contributions to Decision 06-02-033. PacifiCorp shall pay the award to the Yurok Tribe within 30 days from the effective date of this Order.
2. PacifiCorp's payment of the award shall include interest at the rate earned on prime, three-month commercial paper, as reported in Federal Reserve Statistical Release H.15, beginning on June 28, 2006, the 75th day after the Yurok Tribe filed its request for compensation, and continuing until full payment of the award is made.
3. The comment period for today's decision is waived.

This order is effective today.

Dated June 15, 2006, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
Commissioners

Appendix

Compensation Decision Summary Information

Compensation Decision:	D0606033	Modifies Decision? No
Contribution Decision(s):	D0602033	
Proceeding(s):	A0507010	
Author:	ALJ Kenney	
Payer(s):	PacifiCorp	

Intervenor Information

Intervenor	Claim Date	Amount Requested	Amount Awarded	Multiplier?	Reason Change/Disallowance
Yurok Tribe	4/14/05	\$40,548.76	\$39,952.51		One-half of approved hourly rate applied to time spent preparing the NOI.

Advocate Information

First Name	Last Name	Type	Intervenor	Hourly Fee Requested	Year Hourly Fee Requested	Hourly Fee Adopted
Curtis	Berkey	Attorney	Yurok Tribe	\$225	2005-06	\$225
Scott	Williams	Attorney	Yurok Tribe	\$225	2005-06	\$225
Earl	Selby	Attorney	Yurok Tribe	\$250	2005-06	\$250
Merideth	Drent	Attorney	Yurok Tribe	\$205	2005-06	\$205
Alex	Lowther	Legal intern	Yurok Tribe	\$80	2005	\$80

(END OF APPENDIX)